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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 102.

SAMUEL B. SMITH,

Petitioner,

vs.

E. H. SNOW AND E. H. SNOW, DOING BUSINESS AS SNOW'S HATCHERIES AND SNOW'S INCUBATOR CO., *Respondents.*

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Come now the above named respondents, Snow and Snow, and present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

That a rehearing of this case and consequent reconsideration of this learned Court's opinion and decree rendered on January 7th, 1935, should be granted, we submit, because of the following, among other, reasons:

I. Staged Incubation Is Not One of the Recited Method Steps of Claim 1 and Cannot Be Included in the Claim Unless the Staged Incubation of the Specification Is Incorporated by Reference Into the Claim.

A. In the said opinion, claim 1 has been treated as containing and expressing staged incubation *as a part thereof.* On page 5 of the opinion, it is stated "that the claim, *stand-*

ing by itself, asserts the essential elements of the method of incubation to be: (a) the arrangement of the eggs at different levels *in staged incubation* in a closed chamber, * * *" (Italics ours). But, may it please the Court, there is no recital in claim 1 of staged incubation as a positive step or act in the method recited therein.

In the opinion, page 3, the Court defines staged incubation as "the successive setting of eggs in the same cabinet at brief intervals, of about three days."

Apparently, the passage in the forepart of the claim, "hatching a plurality of eggs by arranging them at different levels * * *" has been treated in the Court's opinion as defining staged incubation as a part of the steps or acts of the method stated in claim 1. But this quoted passage in the claim does not refer to staged incubation; it is completely satisfied by setting, all at one time, eggs of the same age at different levels in the chamber, as distinguished from setting eggs all at one or a single level. It applies simply and solely to placing the eggs at different levels, an arrangement commonly practiced in the old art. See, for instance, patents to Bassini, *et al.*, 330,457, of Nov. 17, 1885 (R. 624); Bell, 691,837, of Jan. 28, 1902 (R. 656); Koons, 916,454, of March 30, 1909 (R. 690); Van Keuren, 1,160,793, of Nov. 16, 1915 (R. 720); and the Bonnemain incubator disclosed in the Ure's Dictionary Article, published in 1867 (R. 809). See the eggs shown in different levels.

Nowhere else in the claim, in the *positive* recital of the essential steps of the hatching method defined, is the setting of eggs in staged incubation specified or implied.

B. The only mention in the claim of staged incubation is in the "whereby" clause *which does not purport to state any step or act of the method.* In the recital of the active steps of the method in the body of the claim, there is no

antecedent for the use of the words, in the whereby clause "more advanced stage of incubation" and "less advanced stage." The whereby clause is merely a functional clause stating the results that must necessarily be accomplished by carrying out the various positive steps in the defined method. Yet the results of the whereby clause in claim 1 of the Smith patent cannot be accomplished, if, taking the claim, standing by itself, all the positive steps specified in the claim, are practiced.

C. Taking the recited positive steps of the claim alone, without implying anything into the claim from the descriptive part of the specifications, *i. e.*, without inferentially including the staged incubation of the specifications into the claim, the claim is completely anticipated by the method of hatching eggs publicly and commercially practiced by the patentee Smith at Cleveland, Ohio, in his Attica built incubator during the years 1913 and '14, more than two years before he applied for his patent. (See Smith's testimony, R. 134-137, also see Part II of this Petition.)

D. Therefore, if the claim is to be saved from invalidity, either because it does not recite sufficient steps to perform the function specified in the whereby clause, or to distinguish from the prior art usage by the patentee Smith, the staged incubation of the descriptive part of the specification must be carried into the claim by inference. The Courts often construe into a claim the descriptive portion of the specification where this is necessary to sustain the validity of the claim.[1]

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[1] Seymour vs. Osborn, 11 Wall. 516, 547; Mitchell vs. Tilghman, 19 Wall. 287, 391-392; Smith vs. Goodyear Dental Vulcanite Co., 93 U. S. 486, 493-494; Sargent vs. Hall Safe and Lock Co., 114 U. S. 63, 85-86; Snow vs. Lakeshore Railroad Co., 121 U. S. 617, 630; Westinghouse vs. Boyden Power Brake Co., 170 U. S. 537, 555, 568, 569; Singer Co. vs. Cramer, 192 U. S. 265, 284; Holland Furniture Co. vs. Perkins Glue Co., 277 U. S. 245.

In the Court's opinion, page 7, the *Snow vs. Lakeshore Railroad Co.* case is cited with approval to show that the claim of a patent may incorporate the specifications and drawings by reference and thus limit the patent to the form described in the specifications. But this Honorable Court did not interpret the claim as carrying the staged incubation of the specifications into the claim by reference, in accordance with the stated rule of law, by reason that the Court overlooked the fact that staged incubation was not recited as one of the steps of the method in the claim.

From the inaccurate condition of claim 1, it results that staged incubation is *not properly and actually a step or feature of the claim* unless the type of staged incubation disclosed in the descriptive portion of the specification is *inferentially* implied into the claim.

E. The one and only staged incubation disclosed in the descriptive portion of the specification is that wherein the eggs are successively set and shifted during the incubating period and the eggs are grouped so that the eggs in the more advanced stages are grouped together and the eggs in the less advanced stages are grouped together—a type of staged incubation admitted by petitioner Smith not to be used in the Snow hatching method. That the patentee Smith intentionally limited his invention on his method to the shifting and grouped type of staged incubation and that no other method of staged incubation was contemplated by him to be within the scope of his patent is clearly shown by statements appearing in the patent specification, page 1, lines 19 to 40 (R. 429), and page 2, lines 79 to 96 (R. 430).

That the shifting and grouped type of staged incubation of the patent specifications must be inferentially included in the claim, if it is possible to find staged incubation at all, is

all the more obvious for the reason that the claim refers back to the specification by reason of termination of the whereby clause in the words *"for the purpose specified."*[1]

Where a patentee has intentionally limited himself in the specifications or claims, he is bound by these limitations.[2]

II. The Smith Invention Is At Most But an Improvement Invention and the Claim Is Not Open to a Broad Interpretation as in the Case of a Generic Invention.

Referring to Smith's prior public use practiced at Cleveland, Ohio, more than two years before his application was filed, this learned Court said (p. 12 of its opinion) "* * * there was no staged incubation * * *" employed by Smith. *This was made the sole difference between the prior public use and claim 1 of the Smith patent* in the interpretation given the claim by the Court. Therefore, we beg to submit that Smith's patent and his claim 1 are not, and cannot be, in the class of generic inventions. This Court found (opinion, p. 12) that the patents to Stulik, Winkler and Zimmer and the article from Ure's Dictionary, relative to the Bonnemain Incubator, disclosed the practice of setting eggs in staged incubation in the old art. Therefore, the later adoption by Smith for use in his prior art hatching method, of such a practice, was not the discovery or creation of a broad, generic invention or method, but at most only the selection from the prior art of a feature which would improve his method—already otherwise public prop-

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[1] Seymour vs. Osborn, 11 Wall. 516, 547; Sargent vs. Hall Safe & Lock Co., 114 U. S. 63, 86; Westinghouse vs. Boyden Power Brake Co., 170 U. S. 537, 568; Singer Co. vs. Cramer, 192 U. S. 265, 284.

[2] White vs. Dunbar, 119 U. S. 47; Motion Picture Patents Co. vs. Universal Film Mfg. Co., 243 U. S. 502, 510.

erty by reason of such public use. All that Smith did, unless he is confined to the staged incubation of the specifications of the Smith patent, was to refrain from setting all the eggs at one time in his prior public use machine and to set eggs at different times in this same machine. This was something any hatchery man, using merely common sense, would obviously do if sufficient eggs were not available to fill the prior use machine at the time of the first setting, and eggs for hatching became successively available after the first setting and before the first set eggs had hatched. Smith merely added old staged incubation which, in itself, was public property and a practice commonly known to hatchery men, to what he had made public property by his own act. Literally, such is the situation, as it appears from the learned opinion of this Court.

For these potent reasons, we beg to submit that claim 1, aside from its inherent infirmities, pointed out above, should be taken out of the generic class and placed, where the prior art and the circumstances of the case seem clearly to put it, in the improvement class where it, at best, would have only a definite and limited scope in accord with the specifications and the actual conditions therein specified.

This is further true for the reasons specified in section I herein, and for the further reason that petitioner Smith's brief writers (Petitioner's Brief, p. 6) distinguished the air current of the claim from air bodies in a state of mere agitation through disclaimer.

III. Respondents' Air Movements.

At pages 13 and 14 of the Court's opinion in this case, it sets forth its conception of the air movements in respondents' machine concluding: "It is enough that there is a movement of air *in current form* following substantially defined paths through the tiers of egg trays, sufficient to effect the desired transfer of heat units." (Italics ours.) This statement involves, we beg to submit, a misapprehension that the respondents' air movements are "in current form" *when* passing "through the tiers of egg trays."

The Court states (opinion, p. 14), that the air movements from the propellers are "toward the top and bottom and sides of the chamber, thence to the corridor and thence through the tiers of egg trays back to the propellers." But this statement overlooks the effect that the air, moved from the tips of one propeller at one side of the chamber, has on the air moving from the tips of the other propeller at the same side of the chamber, and also the effect that the air moved by the two propellers at one side of the chamber have on the air moved by the two propellers at the opposite side of the chamber. As the two propellers at the same side of the chamber revolve in the same direction, air moved tangentially by the adjacent blades of the propellers, due to the centrifugal action of the same, moves in opposite directions so that air moved by one propeller strikes air moved by the other to cause nothing but a churning, stirring and agitating movement of this air. A large body of this churning and stirring air in agitation moves through the egg trays from the propellers by reason of the fact that the tips of the propellers throw this air into the trays not only at the central parts of the trays, fore and aft the chamber, but also elsewhere. Also, when the air movements come from

the two propellers at one side of the incubator in one direction and from the two propellers at the opposite side of the incubator in an opposite direction along the "top and bottom and sides of the chamber" *and meet each other in the corridor, opposing movements clash and result in a churning, stirring and agitating effect. The air is in this mixed and agitated condition when and as it permeates through and between the tiers of egg trays.* This means that the heat units are carried, *not by air currents* but by air in undefined *commotion and agitation.*

The Circuit Court of Appeals for the Eighth Circuit, after viewing the Snow machine in operation in its court room at St. Louis, Mo., so found as a fact where it stated in its opinion, 70 Fed. (2nd) 564, 568 (R. 991), as follows: "Appellants' device is based on an entirely different method * * *. As to the air currents, the arrangement is different. * * * In appellants' device, the conception and operation is a wide, general diffusion of air * * *." And petitioner at page 6 of his brief, in this Court, distinctly distinguishes his forced air currents "from any mere agitation of the air," adding: "It is only by the combination of these two essential elements of staged-incubation *and forced draft* that the invention is accomplished." Thus the simple fact is that in respondents' machine the method there employed is devoid of an air current which passes through and amongst the egg trays. There is no current of air within the meaning of the claim, but only agitated, churned bodies of air surrounding and permeating the egg trays in respondents' incubator.

Judge Hickenlooper held, in *Buckeye Incubator Co. vs. Petersime,* that air in agitation, as distinguished from "forced drafts" was not within the Smith patent, but was in a different school of thought and practice, and he was affirmed by the Sixth Circuit Court of Appeals, 19 Fed. (2nd)

721, Judges Denison, Moorman and Knappen, and, may we say, than Judge Denison, few Judges have had greater attainments in this technical class of litigation. Again, in *Buckeye Incubator Co. vs. Blum,* 17 Fed. (2nd) 456, Judge Westenhaver likewise held that hatching methods employing air in mere agitation were not within the Smith patent, but constituted a different system beyond the limitations of the Smith patent to "a current of air." And he too was affirmed by the Circuit Court of Appeals for the Sixth Circuit, Judges Denison, Moorman and Anderson, 27 Fed. (2nd) 333. Again the Circuit Court of Appeals for the Third Circuit, Judges Buffington, Woolley and Davis, in *Buckeye Incubator Co. vs. Hillpot,* 24 Fed. (2nd) 341, in affirming the District Court decision, holding the patent not infringed, distinguished the *current* of the patent from mere *air agitation.*

Finally, it is thus apparent that what petitioner disclaims at page 6 of his brief, in this Court, namely, "agitation of air," as distinguished from forced drafts, or as this learned Court says "air in current form following substantially *defined paths through the tiers of egg trays,*" is not an infringement of the Smith patent. Such is respondents' position, because they have only air in agitation amongst their eggs and trays. It matters not what character the air movements have along the interior walls of the cabinet in respondents' incubator, so long as there is no general current amongst the trays; but only the churned or agitated bodies of air amongst the trays—a sort of air floating condition. We submit such is the case.

IV. Effect of Opinion on Industry.

The opinions of this learned Court in the present case and in the companion Waxham case, give to claim 1 of the Smith patent a broad, sweeping interpretation heretofore not accorded the claim in prior litigation under the patent. In reliance upon the limited interpretation given claim 1 of the patent, years ago by numerous Circuit Courts of Appeals[1] as well as by other Courts, many companies began the manufacture and sale of incubators, the use of which would not infringe claim 1 of the Smith patent when accorded the meaning given thereto in earlier litigation under the patent, but the use of which would infringe the claim of the patent if given the meaning accorded thereto, now for the first time, by this Court, within less than three and a half months from the date of expiration of the patent. In further reliance upon these earlier decisions, thousands of hatchery men throughout the United States have purchased such machines at an expenditure of millions of dollars and have used these machines during past years for hatching hundreds of millions of chicks. These hatchery men have expected to use these same incubators during the present hatching season, running from about the middle of February to the middle or latter part of May, for the hatching of chicks.

According to the Administrators of the Hatchery Code under the Agricultural Adjustment Administration, there are approximately 11,800 hatcheries in the United States operating incubators which have a combined capacity of approximately 286,000,000 eggs. It is conservatively estimated, in the absence of available definite statistics, that

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1 Buckeye Incubator Co. vs. Petersime, 19 Fed. (2d) 721, 1927; Buckeye Incubator Co. vs. Blum, 27 Fed. (2d) 333, 1928; Buckeye Incubator Co. vs. Hillpot, 24 Fed. (2d) 341, 1928; and other cases.

at least two-fifths of said capacity represents incubators, the past use of which, and the use of which during the present hatching season will be held to infringe the Smith patent, if claim 1 of said patent is accorded the broad interpretation given thereto by this Court in its present opinion. According to the statement of petitioner Smith's brief writers, in their petition for rehearing addressed to the Circuit Court of Appeals for the Eighth Circuit (R. 998), and relating only to incubators of *one manufacture* within limited territory, "* * * within this Eighth Circuit are located at least forty-six hatcheries with a total of not less than 239 Robbins incubators which are substantially identical with those enjoined in the Waxham case."

The vast *bona fide* interests of these many hatchery men throughout the country have become vested rights since the concurring decisions in the Petersime, Blum and Hillpot cases were rendered. The ends of justice will not be carried out if these innocent hatchery men, who established their businesses in reliance upon the interpretation given to claim 1 of the Smith patent in earlier litigation, are to be subjected and exposed to prosecution and harmful litigation and accountings running back as far as six years, which will fall upon them through no fault of their own because of this belated, sweeping interpretation which has now been given to claim 1 of the Smith patent.

That the menace to the hatchery industry is a very real one is shown by the fact that, to our knowledge, over thirty suits[1] brought by the patentee Smith in U. S. District Courts under the Smith patent 1,262,860 are now pending against hatchery men using incubators manufactured by the Lower Incubator Co., of White Pigeon, Mich., The James

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1 See Appendix for identification of these suits.

Mfg. Co., of Ft. Atkinson, Wis., the Robbins Incubator Co., of Denver, Colo. and the Snow Incubator Co., of Sleepy Eye, Minn., one of the respondents herein. By letters sent out to the hatchery trade at large, enclosing copies of the opinions in this suit and in the companion Waxham suit, the patentee has given every indication that a multitude of other suits will be brought against hatchery men throughout the country. Attempts have already been made to secure preliminary injunctions in certain of these suits, using the opinions in the present Snow and Waxham suits as a basis for these injunctions. If these injunctions issue to prevent hatchery men from using their incubators during the present season, not only will this be ruinous to these hatchery men themselves, but also to those engaged in industries allied to the hatching industry. The egg and chicken market will be disturbed, through the dumping of hundreds of carloads of eggs on the market, that would otherwise be used in hatching chicks, and also through the great shortage of chickens and later of eggs that is bound to result by failure of hatchery men to use their incubators during the present hatching season.

We respectfully request this Court to take judicial notice of the stated condition of the hatching industry and of the various suits pending in District Courts brought under the Smith patent. We believe the Court is justified in taking such judicial notice.

As staged incubation, at best, is only indirectly or inferentially in the claim by reference to the specification of the Smith patent; as staged incubation, as such, was public property long before Smith's application was filed (see this Court's opinion, p. 312); and as claim 1 recites specifically the step of "applying *a current* of heated air" to the eggs, as distinguished from treatment of the eggs by a general dif-

fusion or churning of the air; it is submitted that claim 1 does not rise to the dignity of a generic claim for a broadly new invention and should not be so considered to the tremendous destruction and loss of the hatching industry. Equity and public policy require that claim 1 of the Smith patent be now given an interpretation consistent with the interpretations accorded thereto by Circuit Courts of Appeals years ago.

V. Request for Court to View Machine Exhibits in Operation.

At the trial of the case before the District Court, there were introduced into evidence as Defendants' Exhibits H and F, respectively, two full sized incubators, Exhibit H of which was a commercial Smith incubator and Exhibit F of which was a commercial Snow incubator, the use of which was complained of by the complainant. Both of these machine exhibits were installed in the court room of the Circuit Court of Appeals for the Eighth Circuit at St. Louis, Mo., at the time of the hearing before that Court, and the machines in operation were fully demonstrated to the Court, so that the Court could compare the two machines and fully understand the air movements in the Snow machine. The Court was greatly interested in these machines and, undoubtedly, observation of the same greatly influenced the decision by the Circuit Court of Appeals in the present case.

These machine exhibits are still available and, on two weeks' notice, they can be brought to Washington, set up for operation and demonstrated to members of this Honorable Court at a time and place convenient to the Justices. In view of the importance of the decision in this case, and in the companion Waxham case, to the entire hatching indus-

try, request is hereby respectfully made that this Court, or members of the same, view these machine exhibits in operation prior to the time that this petition for rehearing is acted on. The Court can then, from actual observation, determine whether or not the air movements in respondents' machine are in "current" form within the meaning of the claim.

For the various foregoing reasons, it is respectfully requested that this petition for rehearing be granted.

Respectfully submitted,

RALPH E. WILLIAMSON,
GEORGE F. WILLIAMSON,
Counsel for Respondents.

Minneapolis, Minn.,
Feb. 8, 1935.

The undersigned counsel for respondents, certify that the above petition for rehearing is, in our judgment, meritorious and based upon adequate and sufficient reasons, and is not for the purpose of delay.

RALPH E. WILLIAMSON,
GEORGE F. WILLIAMSON,
Counsel for Respondents.

APPENDIX.

Suits Under Smith Patent 1,262,860 Now Pending in District Courts.

Smith vs. Beery (Midland Hatcheries), D. C. Ohio (Columbus), Doc. 1097.

Smith vs. Hall, et al. (Hall Bros.), D. C. Conn. (New Haven), Doc. E. 2369.

Smith vs. F. J. LeMieux and Lapant Hatcheries, Inc., D. C., E. D. Wis., Milwaukee, Doc. 4387.

Smith vs. G. A. Leader (Leader Farms), D. C. Pa. (Scranton), Doc. 1120.

Smith vs. R. W. Hankins (Hankins' Hatchery & Dairy), D. C., W. D. Okla. (Oklahoma City), Doc. E. 1628.

Smith vs. C. L. Capper (Capper's Hatchery), D. C., N. D. Iowa, E. D. (Dubuque), Doc. E. 225.

S. B. Smith vs. H. F. Garbisch, et al. (Maple Dale Hatchery), D. C. Minn. (Winona), Doc. E. 335.

Smith vs. J. A. Deavenport (Deavenport Poultry Farm), D. C. Colo. (Denver), Doc. 10335.

Smith vs. W. G. Lewis and Lincoln Hatcheries Co., Inc., D. C. Nebr. (Lincoln), Doc. E. 492.

Smith vs. J. L. Russell (Russell Poultry Yards), D. C. Oreg. (Portland), Doc. E. 9463.

Smith vs. C. E. Weidler (Golden Rule Hatchery), D. C. Kans. (Topeka), Doc. 1897-N.

Smith vs. C. A. Sims, et al. (Thornwood Poultry Yards), D. C., S. D. Ind. (New Albany), Doc. E. 89.

Smith vs. L. W. Street (Street's Hatchery & Poultry Farm), D. C. Minn., 4th Div., Doc. E. 2723.

Smith vs. C. Barlow, et al. (Barlow and Sons), D. C. Kans., 2nd Div., Doc. 754-N.

Smith vs. E. A. Fitting, et al. (Olmsted County Hatchery),

D. C. Minn. (Winona), Doc. E. 325.

Smith vs. M. Ladd (Swift County Hatchery), D. C. Minn., 4th Div., Doc. E. 2711.

Smith vs. L. A. Austin (The Austin Hatchery), D. C., S. D. Calif. (Los Angeles), Doc. E. 245-M.

Smith vs. Fontana Farms Co., D. C., S. D. Calif. (Los Angeles), Doc. E. 244-M.

S. B. Smith vs. The Buckeye Incubator Co., D. C., N. D. Ohio, E. Div., Doc. 4022, filed Oct. 9, 1931.

Smith vs. Miller Hatcheries, Inc., D. C., S. D. Iowa (Creston), Doc. E. 4108.

Smith vs. L. Auerensen (Ridgeville Hatchery), D. C., N. D. Ohio, E. Div., Doc. E. 5014.

Smith vs. C. A. Engel (Engel's Hatchery), D. C. Kans. (Topeka), Doc. 1905-N.

Smith vs. D. Middleton (Middleton Hatchery), D. C., S. D. Ohio (Dayton), Doc. E. 364.

Smith vs. H. F. Hughes, et al. (Hughes & Son Hatchery), D. C. Oreg. (Portland), Doc. E. 9494.

Smith vs. V. Burbridge, D. C., N. D. Iowa, E. Div., Doc. E. 227.

Smith vs. L. W. Clark (Petaluma Hatchery), D. C., N. D. Calif. (Sacramento), Doc. 1198-S.

Smith vs. H. Atkins (Atkins Farm Hatchery), D. C., S. D. Iowa (Davenport), Doc. 4137.

Smith vs. R. R. Boots (Greenfield Hatchery), D. C., S. D. Ind. (Indianapolis), Doc. 1563.

Smith vs. C. W. Johnson (Johnson Hatchery), D. C., S. D. Ind. (Terre Haute), Doc. E. 149.

Smith vs. J. F. Erdley, et al. (Wray Hatcheries), D. C. Colo. (Denver), Doc. 10386.

Smith vs. E. B. Arnold, D. C., N. D. Calif. (San Francisco), Doc. E. 37860-S.